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In the Supreme Court of the United States

CHAD WEISGRAM, ET AL., PETITIONERS,

v.

MARLEY COMPANY, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* FOR BRUNSWICK CORPORATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 28 U.S.C. § 2106 authorizes a federal court of appeals to order judgment as a matter of law for the defendant where the plaintiff's expert testimony was inadmissible, the balance of the proof was insufficient to sustain the verdict, and the plaintiff failed to establish in either the court of appeals or the district court that he was in any way precluded from submitting his best evidence.

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BRIEF *AMICUS CURIAE* FOR BRUNSWICK CORPORATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The issue in this case is of direct concern to *amicus* Brunswick Corporation.[1] Brunswick is the appellant in an antitrust case now pending before the Eighth Circuit in which it has requested that the court of appeals, as it did here, overturn a jury verdict that rests on speculative and unreasonable expert testimony and order entry of judgment as a matter of law ("JAML").[2] In that case, plaintiffs alleged that through acquisitions of boatbuilders, and by offering boatbuilders and boat dealers discounts based on buying certain percentages of their engine needs from Brunswick, Brunswick monopolized the market for stern drive and inboard marine engines.

Plaintiffs premised their entire case—liability, causation, and damages—on the theory of their sole expert witness, economist Dr. Robert Hall. Hall opined that, in a competitive market with two engine manufacturers, each would have an equal market share. Thus, any market share above 50% derived from anticompetitive conduct. Based on that artificial assumption, plaintiffs contended that Brunswick's higher market share was attributable to unlawful discounts and acquisitions and necessarily resulted in monopolistic "over-

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[1] The written consents of the parties to the filing of this brief have been lodged with the Clerk. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Concord Boat Corp.* v. *Brunswick Corp.* (8th Cir.).

charges" for its engines. The jury found for plaintiffs on that theory, awarding them more than $133 million after trebling.

Because Hall's theory was unsupported by record evidence, unreasonable, and contrary to fundamental antitrust principles, Brunswick's position on appeal (as it had been in motions *in limine* and for JAML) was that Hall's testimony could not sustain a jury verdict for plaintiffs. Since Hall's conjectural and methodologically unsound theory was essential to the jury verdict—yet could not support it—the disposition on appeal could only be judgment as a matter of law for Brunswick.

Brunswick has expended large amounts of time and money in the *Concord Boat* case, and the size of the jury award against it is staggering. Brunswick has a direct interest in this Court's reaffirmation of the principle that courts of appeals have discretion (and in some cases, such as Brunswick's, have an obligation) to direct judgment for defendants when it is apparent that a jury verdict cannot stand due to insufficient or inadmissible expert testimony. Brunswick has experience with complex, protracted cases, where the automatic retrial rule proposed by petitioner would lead to a highly unreasonable consumption of judicial and private resources. Brunswick therefore has a substantial interest in urging that, when a court of appeals reverses a district court for the inadequate performance of its *Daubert*[3] gatekeeping functions, its option to direct judgment for the defendant is preserved.

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[3] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

STATEMENT

In December 1993, Bonnie Weisgram was killed in a fire at her home. A fifteen-year-old baseboard heater located in Weisgram's entryway and manufactured by respondent Marley Company ("Marley") was investigated as one of the possible causes of the fire. On July 31, 1995, Weisgram's son, petitioner Chad Weisgram (individually and on behalf of her heirs) filed suit against Marley for the wrongful death of his mother. Petitioner brought his claim under a strict products liability theory and so was required to prove that a defect in the heater proximately caused his mother's death. Pet. App. A-3 to A-5.

The trial commenced in May 1997, during which both parties offered expert testimony regarding the cause of the fire. Following eight days of trial, the jury returned a verdict in favor of petitioner. Marley moved for judgment as a matter of law and, in the alternative, for a new trial, arguing in part that petitioner's expert testimony was inadmissible and, therefore, that the evidence was insufficient to support the verdict. The motions were denied. Pet. App. A-4 to A-5, A-29.

The Eighth Circuit reversed and ordered entry of judgment as a matter of law for Marley. The majority held that the opinions of petitioner's three "experts"—who were the only witnesses to testify that the heater was defective in design or manufacture—should not have been admitted because they were unreliable and speculative. Pet. App. A-6 to A-7. Without that testimony, petitioner necessarily failed on an essential element of his products liability

claim and the "jury's verdict [could] not stand." *Id.* at A-17.

Before reaching its decision, the Eighth Circuit conducted a comprehensive review of "the entire transcript of the trial in this case" and determined that petitioner "had a fair opportunity to prove [his] claim [but] failed to do so." The court explained that petitioner was not entitled to a "new trial" that would "reopen discovery" and allow testimony from "additional witnesses" who were never identified. Pet. App. A-16, A-5 to A-6 n.2. In the district court, there had been ample time for discovery, preclusive deadlines were instituted for the exchange of expert reports, and a final pretrial order was entered which identified all the evidence that could be introduced at trial. Petitioner was also on full notice that Marley would challenge his experts. Marley moved *in limine* to prohibit petitioner's experts from testifying at trial because their opinions were inadmissible under Fed. R. Evid. 702 and *Daubert* as "speculative" and lacking adequate scientific or factual foundation. Marley then reasserted those objections to the expert testimony in its motions for judgment as a matter of law. J.A. 75, 123; C.A. App. 109, 111, 294.

Judge Bright dissented, concluding that, if the district court did in fact err in admitting the expert testimony, "the relief to be awarded is a new trial, not judgment as a matter of law." Pet. App. A-26. Judge Bright nowhere claimed that a new trial was warranted to remedy erroneous instructions or evidentiary rulings in the court below, nor did petitioner advance any such argument in either the district court or the court of appeals. Judge

Bright, like petitioner, advocated a rule of automatic retrial, regardless of whether the verdict-winner shows a factual basis for such relief.

This Court declined to grant certiorari to review the majority's conclusion that petitioner's expert testimony was inadmissible. Thus, the only issue before the Court is whether it was improper for the Eighth Circuit to enter judgment as a matter of law for Marley, *even though* it found that petitioner's evidence of liability was legally insufficient and petitioner never argued that he was in any way precluded from putting on his best case.

SUMMARY OF ARGUMENT

Decisions of this Court and the federal courts of appeals establish that when a court of appeals reverses a jury verdict for a plaintiff, it may direct judgment as a matter of law for the defendant based on insufficiency of the evidence. Judgment as a matter of law should be granted if the plaintiff does not proffer sufficient *admissible* evidence to create a jury question.

That appellate courts can overturn a jury verdict as a matter of law is borne out by the broad and explicit grant of jurisdiction to those courts under 28 U.S.C. § 2106 to "reverse any judgment" and "direct the entry of such appropriate judgment" as "may be just under the circumstances." The plain implication of Fed. R. Civ. P. 50, as substantiated by its history and appellate practice, is the same: courts of appeals have the authority and discretion to direct judgment for the verdict-loser. Moreover, viewed as a cohesive whole, the Federal Rules of Civil Procedure are directed towards

achieving the efficient dismissal of *any* claim or defense as soon as it is apparent that it is legally insupportable.

The contrary view espoused by Judge Bright in his dissent below conflicts squarely with this Court's decision in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), which held that there is "nothing" in the federal rules that suggests "that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Id.* at 324. If, without expert testimony held inadmissible on appeal, the evidence tendered by the plaintiff at trial is legally insufficient, concerns of fairness and efficiency are properly resolved by allowing the court of appeals to decide whether to enter JAML, remand for a new trial, or remand for consideration whether to grant a new trial. Where, as here, the appellee offers the court of appeals no factual basis for believing that a new trial is required, the court of appeals may direct entry of JAML without a remand. The appellate court is well situated to "make final disposition of the issues presented." *Id.* at 329.

Besides contravening legal principles recognized in this Court's decisions, a reversal of the Eighth Circuit's holding would have detrimental practical consequences, particularly where the underlying suit is protracted and complicated. If complex, lengthy, and expensive cases such as Concord Boat's antitrust suit against Brunswick could routinely be retried in spite of deficient expert testimony, there would be a needless waste of public and private resources and an unjustifiable burden on the federal court system. Furthermore, carving out an exception that allows for easy retrial in suits where an inadmissible expert opinion is introduced would encourage the submission of dubious proof. The plaintiff could gamble on "cheap and easy" expert testimony with knowledge that he always has the safety net of a new trial should he fail.

ARGUMENT

I. THE EIGHTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN ORDERING JUDGMENT AS A MATTER OF LAW.

A. The Automatic Retrial Rule Advocated By Petitioner Is Contrary To The Weight Of Authority In The Federal Courts Of Appeals.

Petitioner urges this Court to adopt the unwavering rule espoused by Judge Bright in his dissent below that, when a court of appeals deems a plaintiff's expert testimony to be so defective that it is inadmissible, the court's only option is to order a new trial; judgment as a matter of law for the defendant is not an option. Petitioner contends that this accords with the established practice of appellate courts. Pet. Br. 23, 27. Yet as the majority below succinctly explained, when plaintiffs have had their day in court, there is "no reason to give [them] a second chance to make out [their] case." Pet. App. A-5 n.2. Before turning to how this conclusion is supported by this Court's precedents and the controlling statute and rules, it is useful first to examine the genesis of the handful of erroneous decisions in which Judge Bright and petitioner put such stock.

Courts of appeals across the country have long recognized that if a plaintiff's expert testimony does not suffice to create a jury question, judgment as a matter of

law for the defendant is appropriate. Depending on the situation, it may even be required. As the Fifth Circuit held over thirty years ago, when faced with an expert opinion that leaves "gaping chasms in the [plaintiff's] proof," the "*compelled*" result is reversal of the jury verdict and entry of judgment for the defendant. *Insurance Co. of N. Am.* v. *Chinowith*, 393 F.2d 916, 918, 920 (5th Cir. 1968) (emphasis added). Accord *Atchison, T.&S.F. Ry.* v. *Hamilton Bros.*, 192 F.2d 817, 822 (8th Cir. 1951); *Ralston Purina Co.* v. *Edmunds*, 241 F.2d 164, 170 (4th Cir. 1957).

Subsequently, Judge Donald Lay, writing for the Eighth Circuit, introduced an unprecedented detour in the law by refusing to approve of JAML where expert testimony was inadmissible. In *Midcontinent Broadcasting Co.* v. *North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir. 1973), the district court had awarded defendant judgment as a matter of law after determining that expert testimony on the sole matter in dispute was inadmissible and, thus, insufficient to support the verdict. Relying primarily on a decision by the Supreme Court of New Mexico, Judge Lay reversed and announced categorically that "the proper remedy to correct any evidentiary error * * * is a new trial." He maintained that all evidence submitted to the jury, both competent and incompetent, must be evaluated in ruling on a post-verdict motion for judgment as a matter of law. This supposedly avoided "plac[ing] plaintiff in a relative position of unfair reliance." *Id.* at 359. "If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have

supplied further foundation or even totally different evidence." *Ibid.*[4]

Other appellate courts have since echoed this "unfair reliance" theory and repeated Judge Lay's reasoning. See, *e.g.*, *Persinger* v. *Norfolk & W. Ry.*, 920 F.2d 1185, 1186, 1189 (4th Cir. 1990); *Sumitomo Bank* v. *Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Douglass* v. *Eaton Corp.*, 956 F.2d 1339, 1343-1344 (6th Cir. 1992); *Schudel* v. *General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997); *Kinser* v. *Gehl Co.*, 184 F.3d 1259, 1267 (10th Cir. 1999). Yet notwithstanding decisions of individual panels, most of these same circuits—notably, the Fourth, Fifth, Sixth, Eighth, and Tenth—have freely exercised their power to direct judgment for the defendant where expert testimony is inadequate to justify a jury verdict for the plaintiff. *E.g.*, *Redman* v. *John D. Brush & Co.*, 111 F.3d 1174, 1178-1180 (4th Cir. 1997) (reviewing only "the competent portions of [expert's] testimony" in granting JAML); *Lawrence* v. *General Motors Corp.*, 73 F.3d 587, 590 (5th Cir. 1996) (ordering JAML due to insufficient expert testimony); *Smelser* v. *Norfolk S. Ry.*, 105 F.3d 299, 306 (6th Cir. 1997) (reversing denial of

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[4] Judge Lay cited *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 248 (1940), which implied in *dicta* that a trial court's mistakes in admitting evidence should not be considered on a motion for judgment. But Judge Lay overlooked *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), the leading case in this area, which, as demonstrated *infra*, firmly establishes the ability of federal appellate courts to order judgment as a matter of law due to evidentiary insufficiency. Subsequent decisions following Judge Lay's reasoning have likewise failed to take account of this Court's controlling decision in *Neely*.

JAML because expert's testimony was inadmissible); *Wright* v. *Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (same); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968-969 (10th Cir. 1994) (granting JAML where expert testimony could not support jury verdict). The Third and D.C. Circuits have consistently acknowledged and adhered to this traditional practice. *E.g.*, *Lightning Lube, Inc.* v. *Witco Corp.*, 4 F.3d 1153, 1198-1200 (3d Cir. 1993) (JAML should be entered if vital expert testimony is inadmissible); *Scott* v. *District of Columbia*, 101 F.3d 748, 758, 760 (D.C. Cir. 1996) (reversing denial of JAML where expert testimony was insufficient).

The line of cases that grew out of *Midcontinent* is, then, an aberration. And it is an aberration without any reasoned explanation. As pointed out by the Third Circuit in *Aloe Coal Co.* v. *Clark Equipment Co.*, 816 F.2d 110, 115 (1987):

> We have carefully examined the opinions [following *Midcontinent*] but regrettably we find no reasoned elaboration to support their thesis that "[i]n ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." The longest discussion appears in New Mexico's *Townsend* case which, upon analysis, is one conclusory statement piled on another. What results is a classic case of precedential inbreeding where decisions multiply and parrot a holding, with no court pausing, first, to identify the competing social, public, or private

> interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution.

(Citations omitted). The "closest to an explanation" offered—the putative reliance of the plaintiff on evidence admitted at trial—"does not address either the competing reliance concerns of the defendant, or the homespun axio[m] that a litigant is entitled to only one bite of the apple." *Id.* at 115-116. The unsubstantiated policy assumptions of the *Midcontinent* decisions cannot, in short, justify an automatic retrial rule. They suggest no reason for departing from this Court's decisions, which entitle a defendant to JAML unless the plaintiff, who has tendered "speculative" and "inadmissible" evidence, gives the court of appeals good reason to conclude that a second trial is justified.[5]

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[5] Petitioner argues that, at the very least, every plaintiff in his position "should be allowed to show the district court why a new trial, without the excised testimony, is justified, before judgment is summarily entered against him." Pet. Br. 20. As we demonstrate, *infra*, pp. 12-19, the appellate court has broad discretion to decide between JAML, a new trial, or a remand to examine the new trial issue. Where, as here, the plaintiff offers the court of appeals *no ground to support a retrial*, there is no issue justifying a remand to the district court.

B. Governing Legislation, Procedural Rules, And Decisions Of This Court Confirm The Authority Of Courts Of Appeals To Direct Judgment As A Matter Of Law.

The Federal Rules of Civil Procedure must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This mandate "reflects the spirit in which the rules were conceived and written, and in which they should be, and by and large have been, interpreted." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (1987). To allow retrial as a matter of course when a plaintiff fails to muster admissible expert testimony runs afoul of this directive. Affording an appellate court discretion to order JAML and dispose of the case satisfies both the policy and plain language of the governing statute and implementing rules.

1. *The controlling statute and rules confer authority on appellate courts to dispose of insufficient claims.*

"The Court of Appeals must look to the statute defining its appellate power, 28 U.S.C. § 2106, for guidance as to the kind of order which it may direct the District Court to enter." *Bryan* v. *United States*, 338 U.S. 552, 559 (1950), overruled on other grounds, *Burks* v. *United States*, 437 U.S. 1 (1978). Under the plain language of that section, an appellate court's discretion is broad:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

When reversing a trial court's denial of JAML, this "statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal." *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). To be sure, an appellate court does have two other options: it may remand for a new trial or remand to the district court to make the retrial determination. *E.g.*, 9A WRIGHT & MILLER, *supra*, § 2540 (1995); *Scott*, 101 F.3d at 760. But this is a matter vested in the sound *discretion* of the court of appeals. See *Morgan Guaranty Trust Co.* v. *Martin*, 466 F.2d 593, 600 (7th Cir. 1972) (§ 2106 "grants this court 'broad discretion in the disposition of a case on appeal'"); *Connecticut* v. *Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) ("Ordinarily, it is within the broad remedial authority of an appellate court to reverse an erroneous decision of a lower court and to order that appropriate relief be awarded").

The Federal Rules of Civil Procedure confirm the power of the appellate court to decide that judgment should be directed for an appellant whose JAML motion was wrongfully denied. Rule 50(d) states that "[i]f the appellate court reverses the [denial of JAML] nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

There would be no need to recite that the grant of a new trial or the referral of that question to the court below is *permissible* if a third potential resolution—directing judgment—were foreclosed. In the event of reversal, if the appellee has neglected to demonstrate that further litigation is necessary, and the appellate court finds no such necessity, entry of judgment is the only alternative available.

This is evident from the 1963 advisory committee notes, which describe the traditional practice of federal courts of appeals. The notes indicate that, absent any basis for a retrial, the appellate court may "direc[t] entry of judgment." Fed. R. Civ. P. 50 advisory committee notes (1963). The leading treatises agree. As Professor Moore has observed, "[j]udgment may be entered even when the issue on appeal is the sufficiency of the evidence, especially when the appellee suggests no grounds for a new trial either on appeal or on petition for rehearing." 9 MOORE'S FEDERAL PRACTICE § 50.09[3][b] (1999). See also 9A WRIGHT & MILLER, *supra*, § 2540 ("It now is settled that if the motion for judgment as a matter of law erroneously is denied by the district court, the appellate court has the power to order the entry of judgment for the moving party").

This imposes no hardship because Rule 50 is structured so as to protect the plaintiff's interests. A sufficiently specific motion for judgment must be made at the close of the plaintiff's case and at the close of all the evidence, if it is to be renewed after a jury verdict has been rendered. Fed. R. Civ. P. 50(a)(2),(b). This "avoid[s] making a trap" of the post verdict JAML; the plaintiff is able to cure any deficiencies in its proof that

it may have overlooked prior to submission of its case to the jury. *Greenwood* v. *Societe Francaise*, 111 F.3d 1239, 1244 n.6 (5th Cir. 1997). Certainly, after *Daubert*, all parties are on notice of the standards their expert testimony has to meet to survive judgment. The case law defining what kind of expert testimony is admissible is now voluminous. Lawyers can be under no illusion today that expert testimony will escape vigorous challenge—or that they may withhold their "best case" for later submission.

The need to terminate litigation when it is evident that a plaintiff has not proven, or cannot prove, an essential element of his claim is a defining part of the overall architecture of the rules. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (summary disposition is "not * * * a disfavored procedural shortcut," but an "integral part" of the rules designed to secure a just, speedy, and inexpensive determination of every action). Judgment may be directed for the defendant in such a situation—either at the trial or appellate level—as long as the plaintiff has been alerted that an issue is potentially determinative and has been afforded the opportunity to produce evidence (if any exists) counseling against dismissal. Rule 50 itself embodies that overarching principle by requiring JAML during a jury trial if "a party has been fully heard" on a critical point and "there is no legally sufficient evidentiary basis * * * to find for that party." Fed. R. Civ. P. 50(a), (b).

The guaranteed "second bite" advocated by petitioner would subvert the aim of the federal rules to achieve the swift termination of legally insupportable claims. Moreover, to look only at the record as it existed at the

end of trial, regardless of the actual admissibility of the evidence, artificially confines an appellate court's Rule 50 inquiry. Courts of appeals should not be asked to ignore the reality that crucial portions of the record are inadmissible, and then to pretend that a reasoned assessment of the sufficiency of the evidence is possible. This invites bizarre rulings such as the Ninth Circuit made in *Schudel* v. *General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997). There the court first found that expert testimony, which was plaintiffs' *only proof* of causation of injury, did not meet the *Daubert* standard and should have been excluded. But believing it was obligated to review all evidence admitted at trial, including the expert testimony, the court determined that this unreliable evidence was sufficient to support the jury verdict in favor of plaintiffs. *Id.* at 995-996. Such absurd results defy common sense and make a mockery of the Rule 50 scheme.[6]

2. *The authority of appellate courts to grant judgment as a matter of law is confirmed by this Court's precedents.*

For over fifty years, this Court has consistently held that it is within an appellate court's discretion, after reviewing the record, to dismiss insufficient claims as a

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[6] Even if, in the present context, inadmissible evidence were taken into account, as petitioner advocates (Br. 23, 27), it would make no difference to the outcome. Where, as here, expert testimony is stricken as "speculative" and "unreliable," it cannot be sufficient to sustain a jury verdict. It would be illogical to conclude that testimony ruled inadmissible under *Daubert* on those grounds is *more supportive* of a plaintiff's claim than expert testimony that may be admissible under *Daubert* but is legally insufficient.

matter of law. Building on the analysis laid out in the seminal case of *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), this Court's decisions in the context of both summary judgment and JAML rulings have clearly established the propriety of the Eighth Circuit's direction of judgment for Marley. If the plaintiff had a fair opportunity to introduce evidence that sustains his cause of action at the first trial and fails to do so, he should not be permitted to waste additional resources in a second trial.[7]

In *Neely*, the Court set forth the procedure that courts of appeals should follow under Rule 50(d) when a trial court has erred in denying post-verdict JAML. The Tenth Circuit had found that the plaintiff's evidence at trial was insufficient to go to the jury on the elements of negligence and proximate cause and ordered judgment for the defendant. In affirming, this Court flatly rejected the argument that courts of appeals have a "total lack of power" to direct entry of judgment where the evidence is inadequate to support a jury verdict. 386 U.S. at 330. Noting the statutory grant of broad appellate jurisdiction under 28 U.S.C. § 2106, the Court held that "Rule 50(d) is permissive in the nature of its direction to the court of appeals: * * * there is nothing in Rule 50(d) indicating

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[7] *Neely* was not a revolutionary opinion. This Court had previously approved direction of judgment at the appellate level. See *Pence* v. *United States*, 316 U.S. 332, 340 (1942) (affirming appellate court's entry of judgment for the defendant because the record "overwhelming[ly]" supported the affirmative defense of fraud); *New York, N.H.&H.R.R.* v. *Henagan*, 364 U.S. 441, 442 (1960) (per curiam) (ordering entry of JAML for the defendant after examining the trial record and finding plaintiff's proof of negligence inadequate to send to the jury).

that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Id.* at 324.

This Court's decision in *Neely* rested on considerations of judicial economy. The Court acknowledged the importance of protecting the rights of plaintiffs whose new trial issues might be better addressed to the district judge, but was not persuaded that those concerns justified a "rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to *speed litigation and avoid unnecessary retrials*." 386 U.S. at 326 (emphasis added).

Based upon that consideration, this Court determined that a "discriminating approach" should be taken when reversing the denial of a post-verdict JAML. *Ibid.* After an examination of the evidence, the court of appeals has discretion to decide whether to order dismissal of the action or a new trial. *Id.* at 327. The question need not be "remanded" to the district court. If the evidence is challenged as insufficient to support the verdict, the appeal raises "issues of law with which the courts of appeals regularly and characteristically must deal." *Ibid.* The district court has "no special advantage or competence in dealing with them." If the appellee does proffer a ground for a new trial, the appellate court is well situated to "make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

After dispelling the notion that, given its familiarity with the case, the trial court is better equipped to decide

between JAML and a new trial, *Neely* explained that a plaintiff who neglects to raise new trial issues before the court of appeals has *waived* them. *Id.* at 329-330. The onus is on the plaintiff throughout the course of the litigation to guard against waiver by specifically urging grounds for a new trial. The plaintiff has numerous opportunities to make the requisite factual demonstration:

> [H]e may bring his grounds for a new trial to the trial judge's attention when defendant first makes an n.o.v. motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

Id. at 328-329. The petitioner in *Neely* did *none* of these things but instead stated in her appellate brief that the "'lawsuit was fairly tried and the jury was properly instructed.'" *Id.* at 329. The *Neely* opinion therefore refused to address a proffered ground for a new trial presented, for the first time, in petitioner's merits brief in this Court. *Id.* at 330.[8]

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[8] Contrary to petitioner's suggestion (Br. 22), *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967) (per curiam), reaffirmed *Neely*. *Iacurci* remanded a case to the district court because the jury's failure to respond to four out of five special interrogatories left "unresolved issues of negligence" and because the plaintiff timely asserted trial errors in the court of appeals. *Id.* at 88. Justice Harlan concluded in dissent that even in those circumstances, "this Court should overturn a considered judgment of a court of appeals on such issues only in situations of manifest abuse of discretion." *Id.* at 89. The majority disagreed with Justice Harlan not on that legal principle, but on its application to an unusual factual record.

Some twenty years later, this Court expanded on the role of judgment as a matter of law in civil litigation. In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), the Court held that the Rule 56 standard mirrors the standard for JAML under Rule 50—*i.e,* "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof"—and stressed that the federal rules must be interpreted so as to fairly and expeditiously resolve suits and bring an end to legally insupportable claims. *Id.* at 323. Consistent with that goal, if the plaintiff has had adequate warning that he must come forward with his best evidence and loses on summary adjudication, he will have no further opportunities to advance triable evidence or undertake more discovery. *Id.* at 326. Because litigation can be conclusively terminated in this manner at the *pretrial* stage, it follows *a fortiori* that a plaintiff who fails to make out his claims after a *full trial* should receive equivalent treatment.

This Court's decisions in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), are to the same effect. *Matsushita* ruled that where a proffered expert study was "implausible and inconsistent with record evidence," the plaintiff could not survive summary judgment. 475 U.S. at 594 n.19. Building on *Matsushita* and *Celotex*, *Brooke Group* held that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot

support a jury's verdict." 509 U.S. at 242. *Brooke Group* required entry of JAML where the expert's opinion was contradicted by the facts and thus could not justify the jury's verdict that an antitrust violation had occurred. If expert opinions cannot sustain a verdict because they are weak, unpersuasive, or inadmissible under *Daubert* (as in the instant case), entry of judgment for the defendant is not only warranted, but required.

Other decisions of this Court teach the same lesson. As *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988), explains:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [legal standard], judgment [can] properly be entered for respondent at once, without a new trial.

Boyle rejected plaintiff's argument that he was entitled to a retrial because the formulation of the military contractor defense ultimately adopted by the court of appeals differed from the instructions given by the district court to the jury. In reaching the same result in *United States* v. *Generes*, 405 U.S. 93 (1972), this Court squarely rejected Justice White's assertion that because the plaintiff *might* be able to produce enough evidence under the correct legal standard to create a jury question, the retrial issue should be referred to the district court. *Id.* at 112-113 (White, J., concurring in part). There was simply no cause for a new trial because "nothing [in the record] would support a jury verdict in [the plaintiff's] favor had the [correct] standard been embodied in the [jury] instructions." *Id.* at 106. Accord *Consolidated Rail Corp.* v. *Gottschall*, 512 U.S. 532, 558 (1994)

(remanding with instruction to enter judgment for defendant because, notwithstanding expert medical testimony, plaintiff's case "plainly [did] not fall" within the Court's definition of negligent infliction of emotional distress under FELA).

The principle exemplified in these precedents is clear: if the plaintiff failed to offer admissible evidence that was sufficient to sustain a verdict in his favor, a new trial is not warranted. Only if the plaintiff was precluded from averting that failure—for example, by the trial court's instructional error or manifestly erroneous exclusion of other evidence that would have strengthened the plaintiff's case—would a new trial be appropriate. See *Neely*, 386 U.S. at 327. A plaintiff, who bears the burden of proof, is *not* entitled to a new trial simply to obtain a second chance to muster a legally sufficient case: "a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 897 (1990).

3. *The Eighth Circuit's decision comports with this Court's precedents.*

Because petitioner had every opportunity and incentive to adduce the type of proof necessary to support his claims but failed in that endeavor, a direction of judgment against him was required. During the two years before petitioner's case came to trial, there was an extensive period of discovery,[9] with preclusive orders

[9] The deadline for fact discovery was extended to December 31, 1996, after initially being set for October 1, 1996. See Order (Oct. 1, 1996; Klein, M.J.) (Docket entry no. 16); Scheduling/Discovery Plan (Oct. 31, 1995; Klein, M.J.) (Docket entry no. 8) (hereinafter "Scheduling Order").

entered to resolve the litigation efficiently. Both parties were notified that they must "identify expert witnesses and the subject matter of their proposed testimony" by prescribed dates and, soon thereafter, "provide complete reports." Scheduling Order ¶¶ 3-4. A final pretrial order specified the evidence that could be presented at trial, including all experts who would, or might, be called. J.A. 66. The district court thus did everything possible to advise petitioner of preclusive deadlines for marshaling his proof and preparing for trial.

Petitioner had ample notice that there were potential flaws in his case and ample time to rectify them. Both because of his counsel's familiarity with *Daubert* and the numerous challenges brought against his experts, he was well aware of the admissibility hurdles he needed to clear. In its motion *in limine* and again in its multiple motions for JAML, Marley charged that petitioner's expert opinions were "untested and speculative." J.A. 75, 123; C.A. App. 109, 111, 294. Despite these challenges, petitioner did not attempt to muster additional expert support to bolster his theory that Marley's product was defective. In fact, petitioner *voluntarily* chose not to put on one of the experts disclosed in the pretrial order. See Marley C.A. Br. 14.

Given this record, the Eighth Circuit was more than justified in exercising its discretion to order JAML instead of a new trial in what it described as "not a close case." As this Court has invariably done, the Eighth

Circuit simply refused to ignore the infirmities in petitioner's critical expert testimony and speculate about what type of case he *might* be able to assemble were he permitted to try the case again. Pet. App. A-5 to A-6 & n.2 (rejecting any contention that a new trial was required "because [the] failure to do so would deny the plaintiffs the opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability"). That fact-bound and discretionary ruling is entitled to deference in this Court. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990) (where "discretion" is vested in a lower court, review is "deferential").[10]

Until his present brief in this court, petitioner himself agreed with the Eighth Circuit's finding of "fairness." He neglected to dispute that assessment or to make any factual argument that a retrial was warranted due to erroneous rulings, surprise, preclusion, or unfair reliance at trial. To preserve his right to pursue a new trial, petitioner should have conditionally asked the district court for retrial in the event his expert evidence was deemed invalid after the verdict. And, on appeal, "in the course of arguing for his verdict [he

[10] In *Neely*, this Court was willing to *assume* that the court of appeals "consider[ed] the new trial question in the light of its own experience with the case." 386 U.S. at 329-330. By contrast, the Eighth Circuit's opinion here demonstrates affirmatively that it diligently performed its duty of review, examining the entire record for unfairness. Pet. App. A-16. *Neely* thus provides *a fortiori* authority for affirmance here.

should have] indicate[d] why he [would be] entitled to a new trial should his judgment be set aside." *Neely*, 386 U.S. at 328. But petitioner did exactly the opposite. He reiterated several times in his trial and appellate briefs that the district court accurately instructed the jury (C.A. App. 357; Pet. C.A. Br. 43, 49) and "did not commit prejudicial error" (C.A. App. 360, 354). See also Pet. C.A. Br. 50 (requesting that "the Court affirm the District Court in all respects"). Even in his petitions for rehearing and certiorari, he merely cited Judge Lay's opinion in *Midcontinent*, along with similar decisions, and asserted mechanically that retrial was required, without offering any showing that he was deprived of a fair trial. J.A. 146-147; Pet. 10-11.

Just as in *Neely*, petitioner's omissions and concessions are fatal. He has waived his right to raise new trial issues and cannot now impeach the Eighth Circuit's determination of fairness with arguments he has not previously advanced. See *Neely*, 386 U.S. at 329; see also *Ohio Forestry Ass'n* v. *Sierra Club*, 118 S. Ct. 1665, 1672-1673 (1998) (raising argument for the first time in a Supreme Court merits brief is "legally fatal").

Finally, even if timely raised, petitioner's current, generalized complaint that he would have "tried [the case] differently" if his expert opinions had been excluded at trial still would not justify retrial. Pet. Br. 25. Commentators agree that a court of appeals should direct entry of judgment for the defendant unless the plaintiff makes a precise showing that there is additional, available evidence that would change the result and which was not introduced at trial due to "excusable" neglect. Martin B. Louis, *Post Verdict Rulings on the Sufficiency*

of the Evidence: Neely v. Martin K. Eby Construction Co. Revisited, 1975 Wis. L. Rev. 503, 518 (1976). See also *MacEdward* v. *Northern Elec. Co.*, 595 F.2d 105, 114-115 (2d Cir. 1979) (Waterman, J., dissenting) (direction of a new trial is rare and appears to be limited to situations where the appellee demonstrates an excusable, curable gap in its evidence or that it was handicapped in developing its case); *Safeway Stores* v. *Fannan*, 308 F.2d 94, 99 (9th Cir. 1962) (counsel for plaintiff made no suggestion "that he was surprised (in a legal sense, as distinguished from the usual 'surprise' of a losing counsel), or of any other reason why the matter should not have followed the normal course to a judgment on the merits").

II. GUARANTEED RETRIAL IN COMPLEX CASES WOULD CREATE PERVERSE INCENTIVES AND WASTE JUDICIAL RESOURCES.

Efficient termination of meritless claims is an increasingly significant concern in complex and protracted litigation. Extended cases consume large amounts of time and money, imposing a heavy burden on the judiciary, the parties, and other litigants who are entitled to their day in court. Unless appellate courts retain discretion to grant JAML in those disputes due to evidentiary insufficiency, an unnecessary waste of judicial resources and further congestion of an already-overtaxed federal court system will result.

Petitioner's suit already has made a large claim on the resources of the federal courts. This case involved two years of pretrial proceedings and occupied eight trial days. The parties engaged in prolonged discovery and made countless motions. Petitioner alone tendered the

opinions of a "fire cause and origin" expert; a "fire investigator" and "technical forensic expert"; and a "metallurgist." Pet. App. A-8, A-11, A-13. Marley was required to respond with more expert testimony: a heater expert; three engineers knowledgeable about various component parts of the heater; and a chemical engineer. Marley C.A. Br. 20-24. Giving petitioner an opportunity to improve on his deficient presentation on retrial in such a protracted case would conflict with any reasonable concept of judicial economy.

Considering the large number of complex lawsuits currently pending, petitioner's automatic retrial rule would seriously undermine the goal of the Federal Rules to resolve "every action" in a "just," "speedy," and "inexpensive" manner. Fed. R. Civ. P. 1. Concord Boat's suit against Brunswick highlights the danger of permissive retrials, since "antitrust cases [are] among the most drawn out and expensive types of litigation." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). More than two years passed before the claims were tried in the *Concord Boat* case, during which time exhaustive discovery culminated in the production of over a million documents. The parties took the depositions of dozens of witnesses, including proffered expert witnesses, and the trial lasted three months. An unnecessary retrial in such a case would impose a serious burden on the district court and the parties. As the Second Circuit has incisively stated, judgment as a matter of law is "an important procedural device in antitrust cases, because it enables courts to efficiently resolve potentially costly and time-consuming litigation which can chill competitive forces." *Clorox*

Co. v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997).[11]

Ordering retrial where expert testimony is inadmissible would erode the salutary incentive to offer a litigant's best case the first time around. The risks associated with using a dubious expert theory would effectively be canceled out. The *Concord Boat* case is again illustrative. A preclusion order instructed the parties in that case to disclose and memorialize their expert opinions by a specified date.[12] Plaintiffs settled on Dr. Hall, whose proffered opinion (that the jury *must* find Brunswick liable and award damages *simply because* it had a market share above 50%) was unprecedented in antitrust litigation. Because plaintiffs were represented by sophisticated antitrust counsel and faced motions *in limine*, they were well aware that Hall's opinion would be vigorously attacked under *Daubert* and might not survive such a challenge. Nonetheless, they made the deliberate tactical choice to retain him as their sole expert witness—and to gain the *in terrorem* effect on settlement evaluations that was imposed by Hall's unprecedented theory. If plaintiffs were awarded a new trial, despite the insufficiency of Hall's testimony, they

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[11] Combined with the treble damage penalty, the free availability of new trials in antitrust cases also would threaten to become a tool of coercion. Plaintiffs could impose large costs and economic risks on their adversaries, with the assurance that if they failed in their expert proof, they could start the litigation process all over again and compel their opponent to accept an exorbitant settlement.

[12] The order stated that "failure to include subjects in the initial or supplemental [expert] reports shall preclude use of such testimony at trial, except in extraordinary circumstances."

would be rewarded for offering this defective evidence. However, if the result were entry of JAML, litigants would be motivated to assemble their best evidence at the first trial. The risk of JAML on appeal encourages presentation of sound expert evidence without discouraging the submission of "well-grounded but innovative" theories. *Daubert*, 509 U.S. at 593. A novel expert opinion may be buttressed with additional testimony to guard against entry of judgment. And any cumulation of evidence would represent only a small fraction of the cost of retrying the entire case.

Automatic retrials would largely nullify the conscientious efforts trial judges make to focus and expedite complex cases. Administration of a complex case in the early stages of litigation aims to encourage "earlier dispositions, less wasteful activity, shorter trials, and * * * economies of judicial time and a lessening of judicial burdens." More specifically, "[m]anagement of the disclosure and discovery of expert opinions is * * * essential to ensure adequate preparation by the parties, avoid surprise at trial, and facilitate rulings on the admissibility of expert evidence." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION THIRD 10, 97 (1995). Mandatory retrials—which override preclusive pretrial orders on the speculative premise that the plaintiff "might" muster a "better case" in a second trial—undermine the intent of case management and the orderly pretrial process to achieve "a just resolution as speedily and inexpensively as possible." *Id.* at 10.

"The number of cases brought to the federal courts is one of the most serious problems facing them today." Chief Justice Rehnquist, *The 1998 Year-End Report of*

the Federal Judiciary, *The Third Branch* (Administrative Office of the U.S. Courts, Jan. 1999). At a time when "very heavy caseloads with the pressure exerted by the Speedy Trial Act to take criminal cases out of order and try them first makes managing federal district courts' dockets trickier than ever before," it is difficult enough to provide litigants with a single fair trial. *Northern Ind. Pub. Serv. Co.* v. *Carbon Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). Permitting retrial of claims to try to improve an initial defective trial presentation would increase that burden dramatically.

Automatic retrials are especially indefensible in complex suits, in which experienced counsel are well versed in the requirements of *Daubert* as well as general trial strategy. Litigants who have been competently represented and who have had every opportunity to present their best evidence should not be allowed to preempt the judicial calendar by conducting not just one extended trial, but two.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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